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DR ZAKIR ABDUL KARIM NAIK v. KULA SEGARAN V MURUGESON

HIGH COURT MALAYA, KUALA LUMPUR
QUAY CHEW SOON JC
[SUIT NO: WA-23CY-64-11-2019]
B 2 APRIL 2021

CIVIL PROCEDURE: *Discovery – Production of documents – Discretion of court – Whether could be ordered at any time and at any stage of proceedings – Rules of Court 2012, O. 24 rr. 3 & 7*

C

CIVIL PROCEDURE: *Discovery – Production of documents – Defamation – Defence – Pleas that plaintiff was denied entry into some countries and was 'fugitive from justice' – Delivery of documents relating thereto – Whether documents relevant and necessary – Documents not in plaintiff's possession – Whether in plaintiff's 'power' to produce – Whether to be produced – Rules of Court 2012, O. 24 rr. 3, 7 & 8*

D

The plaintiff, a religious preacher, a citizen of India and a permanent resident of Malaysia sued the defendant, a former Federal Minister, for defamation arising from an article and a press statement written and issued by the latter
E which the plaintiff alleged had defamed him. In his defence, the defendant pleaded justification, fair comment and qualified privilege, while at the same time averring that the plaintiff had depicted forms of unacceptable behaviour which led him to be denied entry into the United Kingdom and Canada, that his challenges to the no-entry orders in the English court had been unsuccessful, and that he was a fugitive wanted by the Government of India,
F *inter alia,* for tax and money laundering offences. Having pleaded thus, the defendant invoked O. 24 of the Rules of Court 2012 ('ROC') and applied for discovery of the documents relating to the plaintiff's legal predicaments in the said jurisdictions ('subject documents') arguing that the same were crucial for his defence. The plaintiff objected to the application and contended that
G the subject documents were not in his possession, that, they were irrelevant to the suit, and that the defendant was guilty of inexcusable laches which disentitled him to the documents. It was not in dispute that whilst the defence was filed on 20 January 2020, the notice to produce the documents herein was only issued by the defendant on 11 June 2020.

H

Held (allowing discovery partially):

(1) The test for ordering discovery and production of documents is whether the documents are necessary either for disposing fairly of the matter or for saving costs. As stipulated by O. 24 r. 7(3) of the ROC, these would
I include documents which may lead the applicant to 'a series of inquiry resulting in his obtaining information which may adversely affect his own case, or support or adversely affect another party's case.' Further,

whether the documents are necessary or relevant is primarily determined by reference to the pleadings and the documents ought to be produced despite the complexity or immensity of the task. (paras 16, 19, 21 & 23)

(2) The subject documents are relevant to the issues raised in this case and necessary for disposing of fairly the instant suit and saving costs. The issues as to the denials of entry, and as to the plaintiff's legal problems with the authorities in India, it would be noted, had also, as a matter of pleading, been raised by the defendant. (paras 24, 32 & 46)

(3) Order 24 r. 3 of the ROC refers not only to documents which are in one's possession but also documents in one's power. Additionally, it also speaks of documents which 'have been' in a party's possession or power. Similarly, O. 24 r. 7 refers to a document or class of documents which 'is' or 'has at any time' been in a party's possession, custody or power. (paras 57 & 58)

(4) Documents that 'are or have been' in the plaintiff's power would thus include documents which, although not in his possession, are within his right to obtain from the person who has actual possession. In other words, discoverable documents under O. 24 includes documents that are within the power or control of the plaintiff to produce. On the facts and by his own affidavit, the plaintiff seems to have the power to obtain the subject documents herein. (paras 59, 61 & 62)

(5) The court has wide discretion as to when to order discovery. Although the practice is to refuse discovery before the close of pleadings, O. 24 of the ROC provides that the order may be made 'at any time' and 'at any stage of the proceeding'. In the instant case, it ought to be recalled that the movement control order, which disrupted the filing of interlocutory applications, was implemented in the intervening period between the close of pleadings and the filing of the notice to produce. Also, during the pre-trial case management, directions were given regarding the preparation of documents for the trial. Considering all this, there was no delay on the part of the defendant in filing the notice to produce. (paras 69, 70 & 73-75)

(6) The plaintiff ought to deliver documents regarding his denials of entry into the United Kingdom and Canada, his challenges against the order in the English court, his legal predicaments with the authorities in India, including his relationship with the Islamic Research Foundation and Peace TV there and the legal challenges that he mounted against the Indian Enforcement Directorate in respect thereof. The application for documents relating to the plaintiff's permanent resident status was however irrelevant to the suit and was disallowed. (paras 3, 4, 78 & 83)

Case(s) referred to:

Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB [2019] 10 CLJ 516 CA ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1980] 1 LNS 189 FC ***(refd)***

Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-0 Enterprise Bhd & Ors [2009] 5 MLJ 40 ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 rr. 19, 20, O. 23, O. 24 rr. 3(1), 7(1), (3), 8, 12(1), 13(1)

Other source(s) referred to:

Malaysian Civil Procedure 2018, vol I, p 355

For the plaintiff - Sulaiman Abdullah, Akberdin Abdul Kader, Mohd Rafie Mohd Shafie, Meor Hafiz Salehan & Ardy Suffian Akberdin; M/s Akberdin & Co

For the defendant - K Shanmuga, Fahri Azzat & Nasyrah Samir; M/s Kanesalingam & Co

Reported by Wan Sharif Ahmad

JUDGMENT

Quay Chew Soon JC:

Introduction

[1] The defendant ("D") filed an application *vide* encl. 29 ("encl. 29") for discovery and production of documents against the plaintiff ("P"). Enclosure 29 was made under O. 24 r. 3 and/or 7 of the Rules of Court 2012 ("ROC") and the inherent jurisdiction of the court.

[2] I allowed encl. 29 in part. P filed an appeal to the Court of Appeal against my decision. These are the grounds of my decision.

Enclosure 29

[3] D requested for the following documents to be produced by P (as set out in the schedule to encl. 29):

(1) All documents relating to P's status as permanent resident including;

(a) application form;

(b) approval letters from all Malaysian government authorities including Home Ministry, Immigration Department and National Registration Department; and

(c) copy of P's PR card and P's passport with endorsement of Entry Permit ("Item 1").

(2) All documents relating to P's denial of entry to the United Kingdom and his challenges in court in the United Kingdom including case number CO/8625/2010 as reported in the following cases or any other case;

(a) *Dr Zakir Naik v. Secretary of State for the Home Department & Anor* [2010] EHWC 2825 (High Court of Justice Queen's Bench Division Administrative Court, United Kingdom);

(b) *R (Naik) v. Secretary of State for the Home Department* [2011] EWCA Civ 1546 (Court of Appeal (Civil Division), United Kingdom) ("Item 2").

(3) All documents relating to P's denial of entry to Canada, as recounted in National Post news report entitled: "Controversial Muslim televangelist Zakir Naik banned from Toronto conference" found at the following url: https://nationalpost.com/news/canada/controversial-muslim-televanqelist-zakir-naik-banned-from-toronto-conference ("Item 3").

(4) All documents relating to P's position in and relationship to the Islamic Research Foundation and Peace TV and/or Peace TV Urdu ("Item 4").

(5) All correspondence, documents and other communications between the Directorate of Enforcement, Department of Revenue of the Government of India in relation to P or the Islamic Research Foundation (of which P is the President and founder) ("Item 5").

(6) Copies of all court documents relating to the challenges brought by or on behalf of P or by or on behalf of the Islamic Research Foundation against the Enforcement Directorate ("Item 6").

(7) All documents relating to the suspension of the licence of Peace TV and/or Peace TV Urdu by Ofcom UK ("Item T).

(8) All other documents material and relevant to the facts and matters pleaded in D's defence in P's custody, care and control which;

(a) would either adversely affect P's claim or support D's claim, or

(b) may lead to a series of inquiry resulting the obtaining of information which may either adversely affect P's claim or support D's claim ("Item 8").

[4] I ordered P to produce the documents listed in items (2), (3), (4), (5), (6) and (7) above (collectively "subject documents"). But I did not allow D's application for production of the documents listed in items (1) and (8) above.

Background

[5] P is a permanent resident of Malaysia. He is an Islamic preacher.

[6] D is a member of the Malaysian Parliament representing the constituency of Ipoh Barat. He is also the National Vice Chairman of the Democratic Action Party (DAP). He was formerly the Minister of Human Resources of Malaysia.

[7] P avers that D had defamed, ridiculed and humiliated him.

[8] On 17 April 2017, D made certain remarks about P which were published on Free Malaysia Today, an online media portal, in an article entitled: "DAP: No reason for Malaysia to protect Zakir Naik" which may

be accessed *vide* https://www.freemalaysiatoday.com/category/nation/2017/Q4/17/dap-no-reason-for-malaysia-to-protect-zakir-naik ("FMT article").

[9] The remarks made by D in the FMT article, as italicised below, are alleged to be defamatory of P ("first impugned statements"):

> DAP's M Kulasegaran has urged the government not to "take sides" by providing a safe haven for fugitive Islamic preacher Zakir Naik in Malaysia.
>
> This followed reports that authorities in India were waiting to investigate him on allegations that his speeches spread terrorist propaganda.
>
> Instead, the Ipoh Barat MP called for the government to work together with India to eliminate any crime or wrongdoing.
>
> "*The government should not be protecting him*. If it was a similar situation for others, the government would have deported him and not taken sides," he told FMT today.
>
> Earlier today, Kulasegaran had posted on Facebook, saying: "*As long as Zakir remains in Malaysia, he will drag Malaysia further down. At the back of the minds of the Indian community in this country, it appears that a fugitive is given better protection than the local Indians*."
>
> He said there was no reason for Malaysia to act as a safe haven for Zakir, adding that it would more likely embarrass the country in the international arena.
>
> Kulasegaran, who is also a lawyer, said Zakir should go back to India and clear his name.
>
> "*Zakir out of nowhere has become somebody in Malaysia* with his speeches and Perkasa honouring him for his contributions," he said, referring to Malay right-wing group Perkasa which yesterday presented Zakir with its warrior award for his contributions towards the struggle of Islam.
>
> "*Why is he reluctant?* Now he is saying Muslims are not treated fairly in India. These are arguments that hold no water because money laundering has nothing to do with this. *There is a huge amount of money being transferred here and there*."
>
> Kulasegaran was referring to an April 15 news report in the Hindustan Times saying that the Indian enforcement directorate had filed a charge sheet against Aamir Gazdar, a confidante of Zakir's, and Harmony Media Limited – a company floated by Zakir-for allegedly laundering money on his behalf.
>
> The Indian authority's 1,000-page charge sheet lists Zakir as an accused in the case. It includes the statements of witnesses and several documents which establish the trail of laundered money.
>
> The Times of India has also reported that the Indian National Investigation Agency (NIA) will seek an Interpol notice against Zakir to curb his movements outside Saudi Arabia if he fails to turn up for a probe on his activities.

This came after the controversial Indian preacher had defied repeated summonses. A

The report quoted an NIA official as saying the "red" notice would be issued once a non-bailable warrant against him is procured.

Last November, India banned Zakir's Islamic Research Foundation for five years, citing his "objectionable and subversive" speeches. B

Zakir has said he is willing to be questioned by authorities in India, but only through virtual media as he claimed he would be tortured if he goes back to India.

[10] P contends that the first impugned statements imputed the following against him: C

(i) that P is a criminal;

(ii) that P is evading arrest;

(iii) that P's presence and stay in Malaysia has tarnished the good name and reputation of Malaysia; D

(iv) that P has benefited more rights, privileges and protection from the Malaysian Government as compared to the Indian community, the citizens of Malaysia;

(v) that P is involved in money-laundering and illegal activities; E

(vi) that P is not an honest Muslim preacher in propagating the teachings of Islam.

[11] More than two years later on 13 August 2019, D made further statements about P in a press release titled: "Zakir Naik's presence in Malaysia is embarrassing to all Malaysians", *vide* D's "official" letter on the letterhead of the Menteri Sumber Manusia. F

[12] The statements made by D in the said press release, as italicised below, are alleged to be defamatory of P ("second impugned statements"): G

Menteri Sumber Manusia

Zakir Naik's presence in Malaysia is embarrassing to all Malaysians

For questioning the loyalty of Malaysian Hindus and touching a raw nerve in our Multi-ethnic society, necessary action must be taken against the controversial preacher, Zakir Naik. H

Naik is an outsider *who is a fugitive* and has little knowledge of the Malaysian history therefore *he should not be given such privilege to run down other Malaysians, what more in Questioning their loyalty to the country. His actions do not reflect one deserving of a permanent resident status* and this will be brought up in the next Cabinet Meeting. I

Is Naik also *attempting to create a fissure in a multi-ethnic and religious society so that he continues to enjoy immunity and privilege by obtaining the support of the Muslim community to continue to stay in this country*?

A Is Naik also *leveraging the current polemics related to race and religion in the country for his biased survival and benefits vide* the tax payers' money?

... Should *Malaysians be split over* a man called Zakir Naik?

Therefore, it's time for Malaysians to unite and safeguard the peace and stability of the nation by exposing the *dubious strategy of Naik in using* B *religious and racial sentiments* in a tolerant and harmonious country. *It's time for the fugitive foreigner to leave Malaysia and to face charges of terrorism* and money laundering charges in India.

Naik recently *compared the Hindus in Malaysia to the Muslims in India and said that the former enjoyed more than 100% rights in Malaysia compared to Muslims* C *in India. ...*

If one relates his tribalism speech in Kota Baharu, it further seems to co-relate the Umno/Pas tactics that destabilizes the Pakatan Harapan coalition Government through ethno-religious sentiments which is a regretful misuse of religion in this country.

D M Kula Segaran
Minister of Human Resources

[13] P contends that the second impugned statements imputed the following against him:

E (i) that P is a dishonest person who would abuse the Islamic religion for his selfish purpose;

(ii) that P has unfairly and dishonestly accused the Malaysian Hindus of being disloyal to Malaysia;

F (iii) that P calculatedly attempted to create a gap among the multi-ethnic and multi-religious Malaysians in order to obtain the support of the Malaysian Muslim community so as to enjoy immunity and privilege for his continued stay in Malaysia;

(iv) that P is dishonestly leveraging and taking advantage of the current G polemic relating to race and religion in the country for his survival and benefit;

(v) that P has dubious motives of splitting the Malaysian population and bringing about disharmony or disunity among them;

H (vi) that P does not deserve to be accorded a permanent residency in Malaysia;

(vii) that P is a criminal and has committed several offences, including offences under the Penal Code and the Sedition Act.

[14] On 27 November 2019, P filed this suit for defamation against D. On I 20 January 2020, D filed his statement of defence ("defence"). On 3 February 2020, P filed his reply.

[15] D denies defaming P, or that P has any reputation capable of being defamed. Further or in the alternative, D pleaded the defences of justification, fair comment and qualified privilege.

The Law

[16] The test for ordering discovery and production of documents is whether the documents in question are necessary either for disposing fairly of the matter or for saving costs. (See O. 24 r. 8 and r. 13(1) of the ROC).

[17] This test was reiterated by the Court of Appeal in *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-0 Enterprise Bhd & Ors* [2009] 5 MLJ 40 at p. 51 as follows:

> [25] ... discovery may only be ordered if the court is of opinion that such order is **necessary** either for **disposing fairly** of the cause or matter or for **saving costs**. The **test is necessity** not fairness and it is for the applicant to satisfy the court ... .

[18] In *Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB* [2019] 10 CLJ 516 at 527, the Court of Appeal discussed the jurisprudence related to discovery and referred to the "train of inquiry" concept as follows:

> [11] (b) **What amounts to relevance** was discussed in *Surface Stone Pte Ltd v. Jay Seng Leon and Another* [2011] SGHC 223, in reliance of the case of *Compagnie Financiere du Pacifique v. Peruvian Guano* [1882] 11 QBD 55, where the court said: "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains **information which may** – not which must – either **directly or indirectly** enable the party requiring the affidavit either to advance his own case or to **damage the case of his adversary**. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a **train of inquiry, which may have either of these two consequences** ...

[19] The "train of inquiry" concept appears to be reflected in O. 24 r. 7(3) of the ROC which makes reference to a "series of inquiry". The said rule describes the document, or class of document, which are discoverable as falling within one of the following descriptions:

(a) "a document on which the party relies or will rely;

(b) a document which could:

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

A (c) a document which may lead the party seeking discovery of it to a **series of inquiry** resulting in his obtaining information which may-

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

B (iii) support another party's case.

[20] The fact that the documents to be produced may be voluminous or numerous is no excuse from providing discovery if they are relevant. In *Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1980] 1 LNS 189; [1981] 1 MLJ 105, the Federal Court allowed the production and inspection of bills, C invoices and contracts made between the defendant and all its nominated subcontractors relating to the construction project in question. As well as records of wages of the defendant's workmen and all bills and invoices for the purchase of materials by the defendant relating to the said construction project.

D **[21]** The Federal Court held that the documents in question ought to be produced so long as they are relevant, despite the complexity or immensity of the task. The court said at pp. 106-107 (MLJ):

> If it be the case that discovery is tied to the question whether it is relevant E to any issue or question raised on the pleadings, then the court may order the determination of that issue or question before deciding on the extent of the order for discovery ... But where the **issue or question is clearly raised in the cause or matter**, then equally clearly the order for discovery must be determined by the consideration whether it is necessary at the stage of the application.
>
> F Therefore, if as a **matter of pleadings**, the issue is the quantum of the claim, then the **documents, "the tens of thousands"** of them in the defendant's possession notwithstanding, **must be produced for its proper ascertainment because they are relevant** to it. The **complexity or immensity of the task should not be a deterrence**. Sooner or later, it will have to be undertaken and it should be done as a pre-trial measure rather G than at the trial itself.

[22] In *Yekambaran Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581 at 585, the High Court said:

> The essential elements for an order for discovery are threefold, namely H first, there must be a 'document', secondly, the **document must be 'relevant'** and thirdly, the document must be or have been in the 'possession, custody or power' of the person against whom the order for discovery is sought

[23] The court further said that whether the documents are necessary or I relevant is primarily determined by reference to the pleadings. The following passage from *Yekambaran* (*supra*) is instructive:

> In this context, **relevance is defined broadly**. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. ... If, however, the **document's relevance is to a fact in issue**, not simply to credibility, it has long been settled that **relevance of an indirect kind suffices**.

Decision

[24] Based on the pleadings, I find that the subject documents are relevant to the issues raised in the present case. Further, it is my finding that the subject documents are indeed necessary, both for disposing fairly of the instant suit and for saving costs. Each item of the subject documents will be addressed in turn. Although a similar reasoning may apply across certain of the said items.

Items (2) And (3) Of The Subject Documents

[25] Items (2) and (3) of the subject documents can be conveniently dealt with together as they relate to the alleged denial of P's entry to certain countries, in this case the United Kingdom and Canada.

[26] Under item (2) of the subject documents, D requested documents relating to P's denial of entry to the United Kingdom and his challenges in court in the United Kingdom.

[27] Under item (3) of the subject documents, D requested documents relating to P's denial of entry to Canada.

[28] D pleaded that P had been prohibited from entering the United Kingdom as his speeches and writings have been deemed by the authorities to promote hate and terrorism. (See paras. 3.2 and 10.5 of the defence).

[29] D further pleaded that P was denied entry to the United Kingdom by various decisions of the UK home office between June and August 2010 *inter alia* for engaging in unacceptable behaviour by making statements that attempt to justify terrorist activity and fostering hatred. The decision by the UK home office to deny entry to P was challenged by him in the English courts, but his application was unsuccessful. (See paras. 11.1 and 11.2 of the defence).

[30] D also pleaded that P had been denied entry *inter alia* to Canada in 2010 because of his hate speech and promotion of terrorism. (See paras. 10.5 and 11.3 of the defence).

[31] In item (2) of the subject documents, D referred to two news reports and judgments of the courts of England and Wales, which are already within his knowledge. D said that the English court papers show that P took an active part in those proceedings.

[32] As a matter of pleading, the issue of the alleged denial of P's entry to the United Kingdom and his challenges in court in the United Kingdom were clearly raised. As was the issue of the alleged denial of P's entry to Canada. I therefore consider items (2) and (3) of the subject documents to be relevant and necessary.

Items (4), (5), (6) And (7) Of The Subject Documents

[33] Items (4), (5), (6) and (7) of the subject documents are dealt with together as they concern the same jurisdiction ie, India. And are in relation to (i) the Islamic Research Foundation (of which P is said to be the founder and President) ("Foundation") and (ii) Peace TV (a television channel said to be founded by P).

[34] Under item (4) of the subject documents, D requested documents pertaining to P's position in and relationship to the Foundation and Peace TV.

[35] Under item (5) of the subject documents, D requested documents and communications between the revenue enforcement authority of India and P or the Foundation.

[36] Under item (6) of the subject documents, D requested court documents relating to challenges by P or the Foundation against the Indian revenue enforcement authority.

[37] Under item (7) of the subject documents, D requested documents relating to the suspension of the licence of Peace TV.

[38] D pleaded that that P is a citizen of India and is a fugitive from justice. That he is wanted by the police or other equivalent authority in India for investigation or arrest in connection with charges of money-laundering against P. (See para. 3.1 of the defence).

[39] Further, D pleaded that P was facing charges in India *inter alia* for money laundering offences. That P refused to return to India to answer these charges. According to D, he expressed his honest opinion that P ought to return to India to face the justice system in his home country and clear his name. (See paras. 9.1 and 20.3 of the defence).

[40] D contends that his remarks quoted in the FMT article when read as a whole meant that the actions of the Government of Malaysia may lead ordinary Indian Malaysians to feel disgruntled that a person facing criminal charges was given the privilege of permanent residency so easily and quickly. And given protection of the Government of Malaysia, when many local Indian Malaysians faced discrimination and hardship. D pleads fair comment on a matter of public interest. (See para. 9.2 of the defence).

[41] D also pleaded the following (see paras. 10.1, 10.2 and 10.3 of the defence):

(i) On 17 November 2016, the relevant authorities in India had banned the Foundation, an organisation founded by and principally operated by P, for activities considered to be in the promotion of terrorism.

(ii) From early 2017, news report emerged that the authorities in India had commenced criminal proceedings against P for alleged money laundering. They were also investigating him for spreading enmity among various communities. It was also reported that P had a non-bailable arrest warrant issued against him.

(iii) As early as February 2017, P was quoted in a news report by the Business Standard, India to have expressed through his Indian lawyers a fear of arrest if he sets foot in India. This appeared in an article entitled "Fearing arrest on landing in India, Zakir Naik seeks questionnaire from ED" published on 26 February 2017 found at the url: https://www.business-standard.com/article/news-ani/fearing-arrest-on-landing-in-india-zakir-naik-seeks-questionnaire-from-ed-1170226001751.html

[42] Further, D pleaded that P by himself or through his agents operates or is responsible for the broadcast of a television channel known as Peace TV. And that Peace TV has been banned or prohibited from being broadcast or otherwise restricted from broadcast *inter alia* in India, Bangladesh, Sri Lanka and the United Kingdom. (See para. 10.6 of the defence).

[43] Items (4), (5) and (6) of the subject documents related to allege criminal charges against P or the Foundation. Whilst item (7) pertains to the ban by the UK authorities of Peace TV.

[44] D avers that P has control over the Foundation and Peace TV. In support, D referred to exh. DZN-4 of P's own affidavit affirmed on 2 July 2020 and filed herein. The said exhibit contained the profile of P and showed his association with these entities. Page 4 of the said exhibit reads:

> Dr Zakir Naik - A Brief Introduction
>
> He is the president of Islamic Research Foundation International.
>
> The idealogue and driving force behind Peace TV Network is Dr Zakir Naik. He launched Peace TV English, in January 2006.

[45] Together with his remarks quoted in the FMT article, D shared the following news article on his Facebook page (see para. 11.6 of the defence):

> On 17.4.2017, ... a concerned citizen) penned an opinion piece entitled "Zakir Naik should return to India to face trial" which was published by the online news portal Malaysiakini at the url: https:/www.malaysiakini.com/news/379369. The article reads as follows:

A ...

Interpol red alert

Although an Interpol red alert has been sought against Zakir Naik under a non-bailable warrant issued by Mumbai's Prevention of Money Laundering Act court, no action has been taken to
B repatriate him back to India.

This has placed Zakir as a prime suspect in some major money-laundering. And, instead of going back to India to contend his case in court, the defiant preacher accused the Indian authorities of having "double motives".

C

Malaysians should not be duped by Zakir's argument that he had offered India's National Investigation Agency (NIA) an interview through video conferencing or phone. No authorities would agree to that.

By remaining here in Malaysia or elsewhere, Zakir is putting more
D strain on the country's reputation. Certainly, he does not care as long as he has a place to escape, but it does not go well on his own reputation.

If he has done nothing wrong, he should surrender himself to the Indian authorities and request for the interview to be recorded or
E observed through glass windows by his lawyers. His defiance puts Zakir in a bad light.

Unless he has something to hide, he should not be afraid to face the NIA. The NIA would not have applied for the Interpol alert unless they have obtained solid evidence against Zakir.

F Fugitives have no credibility

Zakir can continue living as a fugitive, but whatever he preached will no longer hold water. We are talking common sense, and there is no attempt to belittle any religion. This is a case involving someone who is being pursued by the Indian authorities.

G On the back of everyone's mind is: "Why is this man running away from the authorities? Is he involved in money-laundering? Why is he allowed to settle down in Malaysia? ...

There are only two options for Zakir. Either he continues to live in Malaysia and remain as a fugitive, or he returns to India to face
H the law enforcers if he believes that he is not guilty of the charges against him ...

As long as Zakir remains in Malaysia, he will drag Malaysia further down. At the back of the minds of the Indian community in this country, it appears that a fugitive is given better protection than the
I local Indians. ...

[46] As a matter of pleading, the issue of P's relationship with the Foundation and Peace TV were clearly raised. As were actions between the Indian authorities and P or the Foundation. So too was the banning of Peace TV. Hence, I consider items (4), (5), (6) and (7) of the subject documents to be relevant and necessary.

Plaintiff's Case

[47] In opposing encl. 29, P canvassed the following four arguments.

[48] First, P contends that the subject documents are irrelevant. I disagree. As discussed earlier, I find that the subject documents are indeed relevant to the issues raised in the present case.

[49] Second, P said that this action of defamation against D is meritorious. According to P, D has filed in a baseless defence, in which the defence relied on by D is based on third party sources which are not verified or authenticated.

[50] However, I do not think the merits or otherwise of P's claim and D's defence respectively should be adjudicated at this stage. That might perhaps arise for consideration in a striking out application under O. 18 r. 19 of the ROC.

[51] But for purposes of a discovery application pursuant to encl. 29, the applicable consideration is whether the subject documents are necessary either for disposing fairly of the matter or for saving costs. I am satisfied that is indeed the case here.

[52] As regards P's allegation that D's defence is based on third party sources which are unverified or unauthenticated, it seems to me that a reason why the subject documents are being sought by D is for the purpose of verifying the said third party sources. I am aware that D cannot shift the burden of proving his defences to P. However, I do not see encl. 29 as tantamount to doing that.

[53] P has come to court to vindicate himself. P says that D has defamed him and tarnished his reputation. In defending the suit, D (as he is entitled to do) has put P to proof with regard to the matters P have relied on to establish his reputation.

[54] The first impugned statements and the second impugned statements were based on matters reported in various news media. In this action, P has put these matters in dispute. The primary evidence for these matters are in P's own possession, custody or power. In the circumstances, P should produce the subject documents which are necessary or relevant in determining these matters.

[55] Third, P said that the subject documents are not in his possession. Fourth, P alleges that there was a delay in filing encl. 29 and that D is trying to delay the trial by filing encl. 29. I will deal with these two arguments.

Possession, Custody Or Power

[56] P said that the subject documents are not in his possession. And that since the subject documents are not in his possession, P could not produce them to D.

[57] However, O. 24 r. 3 of the ROC (concerning an order for discovery of documents) refers not only to documents which are in one's "possession". It also speaks of documents which are in a party's "power". Next, it refers not just to documents "which are" (ie, present tense) in one's possession or power. It also speaks of documents which "have been" (ie, past tense) in a party's possession or power.

[58] In similar vein, O. 24 r. 7 of the ROC (concerning an order for discovery of particular documents) refers to a document or class of document which "is" (ie, present tense) or "has at any time been" (ie, past tense) in a party's possession, custody or power. If not then in his possession, custody or power, that party must explain in affidavit "when he parted with it and what has become of it".

[59] In my opinion, documents that are or have been in P's power include documents which, although not within his possession, he possesses the right to obtain from the person who has actual possession of such documents. That is to say, P has the power to obtain or procure such documents. To my mind, these would include documents which are or have been in the possession of his agent.

[60] D made inquiries through a firm of solicitors in Mumbai, India and discovered that P has appointed lawyers to act for him in the criminal proceedings against him in India. This is shown in the court minutes published on the Indian Sessions Court website showing the outcome of each day's proceedings. Copies of the said court minutes are contained in exh. K-12 of D's affidavit affirmed on 3 September 2020 and filed herein. Thus, D contends that P would have power or control over the documents in relation to the criminal proceedings brought against him.

[61] I am of the view that discoverable documents under O. 24 of the ROC includes documents that are within the power or control of P to produce. This includes those documents which P has a right to obtain although not within his actual or physical possession.

[62] From the affidavit evidence of P himself, it seems to me that he has the power to obtain the subject documents, given his association with the Foundation and Peace TV. As pointed out earlier, P's profile states that he is the President of the Foundation. And describes him as the idealogue and driving force behind Peace TV.

[63] It appears rather telling that P simply said that the subject documents are not in his "possession". He does not deny that the subject documents are within his "power" or control, it seems to me that P has the power to obtain the subject documents from his solicitors having conduct of the proceedings or enforcement actions in the United Kingdom and India.

[64] If P claims otherwise, he must make an affidavit stating whether any of the subject documents is, or has at any time been, in his "power". And if not then in his "power", he must explain in affidavit "when he parted with it and what has become of it".

Delay

[65] P argues that encl. 29 should be dismissed as there was a delay in filing the same. And that D is trying to delay the trial by filing encl. 29.

[66] On 11 June 2020, D's solicitors sent to P's solicitors a bundle of documents which D intends to rely on at the trial. At the same time, D's solicitors issued a notice to produce documents in relation to the subject documents ("notice to produce"). About two weeks later in a reply dated 26 June 2020, P's solicitors declined to produce the subject documents on the premise that they are irrelevant and are not in P's possession.

[67] P complains that the notice to produce (which was issued by D on 11 June 2020) came more than four months after the filing of the defence (which was filed on 20 January 2020). Further, P complains that after more than two months from the notice to produce, D only then filed encl. 29 on 28 August 2020.

[68] According to P, if the subject documents are material and relevant, the notice to produce and encl. 29 should have been issued and filed by D before the filing of the defence. Or as soon as possible before the close of pleadings. But D failed to do so. I disagree.

[69] First, the court has a wide discretion as to when to order discovery. Under O. 24 of the ROC, such order may be made "at any time" (see r. 3(1) and r. 7(1)) and "at any stage of the proceedings" (see r. 12(1)).

[70] Second, I am of the view that it would be more expedient to order discovery after the close of pleadings. So that the issues are crystallised and defined by the pleadings. In this regard, I concur with the following commentary from the *Malaysian Civil Procedure 2018*, Vol. I at p. 355:

> Stage where discovery may be ordered – The court has a wide discretion as to when to order discovery. Generally it is inexpedient and unnecessary to do so until the issues have been defined by the pleadings. Save in exceptional circumstances, the practice is to refuse discovery before the close of pleadings. This is because without the benefit of the pleadings, the court can seldom know what are the matters in question in the action.

[71] The pleadings in the present case are deemed to have closed on 17 February 2020. Namely, at the expiration of 14 days after P filed and served his reply on 3 February 2020. (See O. 18 r. 20 of the ROC).

[72] Subsequent to the close of pleadings, D on 4 June 2020 filed an application for security for costs *vide* encl. 14 against P under O. 23 of the ROC ("encl. 14"). Enclosure 14 was fixed for hearing on 14 August 2020 after affidavits had been exhausted and written submissions filed. At the hearing on 14 August 2020, I dismissed encl. 14.

[73] In the intervening period between the close of pleadings and the filing of encl. 14, recall that the movement control order (MCO) was implemented on 18 March 2020. Understandably, the MCO disrupted and slowed down the filing of interlocutory applications as well as preparation of the documents for trial.

[74] During a case management on 6 March 2020, pre-trial case management (PTCM) directions were given regarding the preparation of documents for the trial. Both sides requested for more time to prepare the PTCM documents. According to the court minutes, P's solicitors said: "we seek 2 months date for cm since our schedule are quite pack in March and April". D's solicitors too requested for more time to file encl. 14.

[75] After encl. 14 was disposed of on 14 August 2020, D filed encl. 29 on 28 August 2020. In the light of the narrative and timeline as outlined above, I do not find that there was any delay on the part of D in filing encl. 29. Much less, any inordinate or unreasonable delay that would justify dismissing encl. 29.

[76] Nor do I think that D is trying to delay the trial by filing encl. 29. I find that encl. 29 is a *bona fide* application that will go towards a fair disposal of the matter and costs saving.

Other Items Of The Schedule To Enclosure 29 That Were Disallowed

[77] Before I end, I will briefly explain why items (1) and (8) of the schedule to encl. 29 were disallowed. Notwithstanding that D did not appeal against that part of my decision.

[78] D contends that if at all P is a permanent resident of Malaysia ("PR"), P procured that status unlawfully, (see para. 3 of the defence). Under item (1) of the schedule to encl. 29, D requested documents relating to P's status as PR. I did not allow the same because it was not relevant to the issues to be tried in the instant suit.

[79] P had already produced a copy of his PR card number 651018-75-5049, PM: A0000027569. That is evidence of his PR status. How he obtained the PR, whether P fulfils the conditions for the grant of an entry permit and whether the PR was obtained illegally (as alleged by D) does not arise for determination by me. The action before me is one of defamation.

[80] This is not the proper forum to determine the validity or otherwise of P's PR. If D wishes to attack the validity of P's PR, he will have to do that in another forum. Perhaps by way of a challenge on an administrative decision made by a public law action for judicial review, where the grant of PR may be quashed by the court.

[81] Next under item (8) of the schedule to encl. 29, D requested all other documents material and relevant to the facts and matters pleaded in D's defence in P's custody, care and control which: (i) would either adversely affect P's claim or support D's claim, or (ii) may lead to a series of inquiry resulting the obtaining of information which may either adversely affect P's claim or support D's claim.

[82] I did not allow item (8) because it did not specify any particular document or class of document. This seemed like a fishing expedition for evidence to me.

Conclusion

[83] For the reasons above, I allowed encl. 29 in part. I ordered costs to be in the cause.